

J185hurC

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 JAMES HURT, JR.,

4 Plaintiff,

New York, N.Y.

5 v.

15 Civ. 7612 (PKC)

6 CITY OF NEW YORK, et al.,

7 Defendants.

8 -----x

9 January 8, 2019
3:10 p.m.

10 Before:

11 HON. P. KEVIN CASTEL,

12 District Judge

13
14 APPEARANCES

15
16 STECKLOW COHEN & THOMPSON
Attorneys for Plaintiff

17 BY: WYLIE M. STECKLOW
-and

18 LONDON INDUSI LLP
BY: CARY LONDON

19 ZACHARY W. CARTER
20 Corporation Counsel for the City of New York
21 BY: QIANA SMITH-WILLIAMS
22 ANGHARAD WILSON
23 Assistant Corporation Counsel
24
25

J185hurC

conference

1 (Case called)

2 THE DEPUTY CLERK: For the plaintiff?

3 MR. LONDON: Cary London. Good afternoon, Judge
4 Castel.

5 THE COURT: Good afternoon.

6 MR. STECKLOW: Wylie Stecklow for the plaintiff. Good
7 afternoon, your Honor.

8 THE COURT: Good afternoon to you, Mr. Stecklow.

9 And for the defendant?

10 MS. WILSON: Angharad Wilson for the City of New York
11 and defendant Michael Connizzo.

12 MS. SMITH-WILLIAMS: Qiana Smith-Williams, Corporation
13 Counsel, for defendants. Good afternoon, your Honor.

14 THE COURT: Good afternoon to you as well and Happy
15 New Year to all. During this conference you all may remain
16 seated because I think we will give you better access to your
17 motion papers.

18 I have a joint pretrial order. Is there any reason
19 why I should not enter the joint pretrial order, as drafted?

20 MR. STECKLOW: I do think there is one addition that
21 we spoke with the City about.

22 MS. WILSON: Yes, your Honor.

23 We would like to amend our exhibit that is currently
24 listed as Defendant's Exhibit B, as in boy --

25 THE COURT: Thank you.

J185hurC

conference

1 MS. WILSON: -- to include a certification from the
2 NYPD certifying it as a business record of the NYPD.

3 THE COURT: Any objection from the plaintiff?

4 MR. LONDON: No objection, your Honor. It's the
5 certification that comes with the --

6 THE COURT: No, it's sufficient to say --

7 MR. LONDON: Sorry. No objection.

8 THE COURT: No objection. Thank you. It is going to
9 be a long trial if I have to hear why are you not objecting to
10 something.

11 MR. LONDON: I apologize.

12 THE COURT: That's all right.

13 MR. LONDON: And on that same wavelength, I wasn't
14 aware -- I don't think we turned over the T-Mobile
15 certification for Plaintiff's Exhibit no. 8.

16 THE COURT: 8.

17 MR. LONDON: Plaintiff's Exhibit 8 is the T-Mobile
18 subpoena results.

19 THE COURT: Any objection?

20 MS. WILSON: I am just going to check the exhibits. A
21 moment, your Honor? (pause) No objection, your Honor.

22 THE COURT: So, I will make the change on Plaintiff's
23 Exhibit 8 and Defendant's Exhibit B indicating after the
24 description of the exhibit, "with business record
25 certification."

J185hurC

conference

1 With that, no other changes to the joint pretrial
2 order?

3 MR. LONDON: Not from plaintiffs.

4 MS. WILSON: Nothing from defendants your Honor.

5 THE COURT: All right. So that's entered as an order
6 of the Court.

7 Let me turn to the *in limine* motions. Plaintiff's
8 first *in limine* motion is the Rule 56.1 statement which
9 plaintiffs argue that the defendants should be precluded from
10 offering any evidence or testimony that are contrary to the
11 statements made in the rule 56.1 statement. I have read the
12 parties' arguments. Anybody have anything they want to add on
13 the subject?

14 MR. STECKLOW: I do, your Honor, if I may be heard?

15 THE COURT: Go ahead.

16 MR. STECKLOW: Obviously the case law and everything
17 is in all of the papers we submitted. We believe that the
18 statements were each supported by both admissible evidence and
19 that the distinction I think that the defense is trying to make
20 is that this is just inartful drafting and I would disagree. I
21 would say if we look back at Mr. Hurt's deposition, that's
22 inartful questioning there. When the City asked the deponent:
23 What was the officer doing while Connizzo was in your face --
24 therefore adopting that Connizzo was the participant -- that
25 would be, I consider, arguing inartful drafting. But what they

J185hurC

conference

1 put into the 56.1 statement was not that. They put forth, I
2 believe, six different statements, one after the other, in the
3 56.1, that was supported by evidence. It wasn't something that
4 they were adopting our facts just for arguments, it was
5 supported by evidence. If it was a mistake on their part then
6 the way that our system of law works is that because a party
7 voluntarily chose an attorney to represent them in an action,
8 they cannot avoid the consequences of the acts or omissions of
9 this freely selected agent. And that's in the *Hoodho* case that
10 was cited in our brief. It would be wholly inconsistent with
11 our system of representative litigation in which each party is
12 deemed by the acts of his lawyer or agent and it is considered
13 to have notice of all facts, notice of which can be charged
14 upon the attorney. Again, that's *Hoodho* quoting *Link v.*
15 *Wabash*, 370 U.S. 626.

16 THE COURT: Mr. Stecklow, here is a very simple
17 question. If the position you are urging is correct, I
18 shouldn't have ruled against you on the summary judgment motion
19 and I should have granted your motion to reconsider, correct?

20 MR. STECKLOW: Yes, your Honor.

21 THE COURT: I decided this in the motion to
22 reconsider.

23 MR. STECKLOW: Okay, your Honor. Obviously we made
24 our arguments. We submitted this before the reconsideration
25 motion was decided.

J185hurC

conference

1 THE COURT: No. The question I was asking you --
2 because it is going to be a very long afternoon otherwise -- is
3 whether there was anything you wished to add to your motion
4 papers, not: *I have it in my motion papers and now I would like*
5 *to make an oral repetition of it.*

6 MR. STECKLOW: Your Honor, I think I added the facts
7 of what happened in the deposition and compared that to the
8 arguments the City was making.

9 THE COURT: Thank you.

10 If you are right, then the motion to reconsider should
11 have been granted. I wrote a four-page decision explaining my
12 ruling and, to repeat, to qualify as a judicial admission, a
13 party must make a clear, unambiguous, and unequivocal admission
14 of fact, acceptance of an adverse party's position for the sake
15 of advancing an argument which is otherwise contradicted by its
16 own submissions, is not an admission entitling the adverse
17 party, in that case the summary judgment, or here, for the
18 admissibility of the admission. So, that's denied. Plus,
19 which if it had any probative value, it is substantially
20 outweighed by the danger of jury confusion. As I explain what
21 a summary judgment motion is, what a local civil rule 56.1
22 statement is, and its office and purpose. So, that's excluded.

23 Now, let's talk about the CCRB report and, as I
24 understand it, the defendants themselves do not intend to offer
25 the CCRB report; is that correct?

Jl85hurC

conference

1 MS. WILSON: Yes. That's correct, your Honor.

2 THE COURT: And it's the plaintiff's position that
3 they intend to offer it but they want portions of the findings
4 removed. Why does the CCRB report come in in certain respects,
5 but when it gets to the one portion that may be arguably of
6 help to the defendants, that should be excluded?

7 What is the rationale?

8 MR. STECKLOW: Your Honor, our rationale is that we
9 are trying to give the jury an understanding as to why Connizzo
10 is here, why he was chosen, how did we find him.

11 The way we found him is because the plaintiff spoke to
12 the police and spoke to the CCRB within a short time after the
13 incident, gave a specific description of the vehicle and
14 Officer Connizzo and that, based on those descriptions, an
15 investigation was undertaken that identified all the vehicles
16 that matched this type of description that were in the Bronx in
17 the police that night. Then they looked at who was in those
18 vehicles and they identified the people who generally matched
19 the description given by the plaintiff. They then brought in
20 only two people, Connizzo and his partner. We then found that
21 information out when we got the file. We found Connizzo on
22 Facebook and our guy said that's him.

23 So, we do need to give the jury some explanation how
24 in the world of the NYPD we found that. Our concern with the
25 findings is that the finding that it wasn't Connizzo and

Jl85hurC

conference

1 Siciliano is simply based on the testimony of Connizzo and
2 Siciliano saying it wasn't us, we were out, we checked out
3 early that night. No investigation done by the CCRB. Those
4 statements, by Connizzo at least, will be here for the jury to
5 hear that testimony.

6 THE COURT: You don't think that's highly misleading,
7 to leave with the jury the impression that the reason Connizzo
8 is a defendant in this case is because the CCRB, based on
9 information it received from Mr. Hurt, included him in their
10 investigation but they're not telling the jury what they found
11 with regard to Mr. Connizzo's participation?

12 MR. STECKLOW: If they had done independent
13 investigation to determine that it wasn't him, I would
14 understand that that would be appropriate, but since their
15 investigation was simply to interview these individuals and
16 listen to them, their testimony and say it wasn't us and adopt
17 that, then that's the testimony that's going to come in. It
18 would be, I believe, improper bolstering for the CCRB findings
19 to come in that are based solely on the testimony that the jury
20 is going to hear, your Honor.

21 THE COURT: Well then, why is it improper bolstering
22 for the CCRB recitation of facts that come solely from what
23 Mr. Hurt said says to come in?

24 MR. STECKLOW: Those facts will come in. If you want,
25 we can delete those fact, we can redact those facts. We are

Jl85hurC

conference

1 happy to do more redactions. It is the idea that we need to
2 give the jury some idea as to why we believe it is Connizzo,
3 how we found him, and this is the only documentary evidence as
4 to that process.

5 THE COURT: Let me hear from the defendants.

6 MS. WILSON: Well, your Honor, we would agree that it
7 is highly prejudicial to have any mention of the fact that
8 there was a CCRB investigation at all and, additionally, it
9 would be even more prejudicial for there to be mention of a
10 CCRB investigation without the conclusion of the CCRB that the
11 results were that Connizzo and Siciliano were not involved.

12 Furthermore, I would just like to say that the CCRB
13 did not come to the conclusion that Connizzo and Siciliano were
14 not involved with the incident merely by interviewing them.
15 They did interview them but they did also check their memo book
16 entries which were made contemporaneously with the events which
17 were months prior to when they were interviewed by CCRB, and
18 their memo book entries reflect that they left early that
19 evening. Nevertheless, defendants would argue that the jury
20 doesn't need to be provided with the context of how Connizzo
21 was identified. The fact of the matter is that plaintiff has,
22 at this point, identified Connizzo as one of the involved
23 officers and there is no -- and I think that that is the only
24 officer who has been identified. I don't think that there is
25 any reason why a jury cannot just accept that he was identified

Jl85hurC

conference

1 through some process that doesn't need to be gone into and I
2 think that there is a good potential for jury confusion as to
3 what the actual issues are if there is a large amount of
4 evidence introduced about the fact that there was an
5 investigation and how the investigation was conducted and was
6 the investigation conducted thoroughly enough. Mr. Stecklow
7 low's brief recitation of how the investigation was conducted,
8 in fact, I think leads to many questions that may confuse a
9 jury and so it is defendant's position that it should be
10 excluded in its entirety.

11 MR. LONDON: It can I just add one thing, your Honor?

12 THE COURT: You may.

13 MR. LONDON: Thank you, your Honor.

14 What Mr. Stecklow was trying to explain is that --

15 THE COURT: Mr. Stecklow is very, very clear so if you
16 have a different point you want to make, make it, but I
17 understand Mr. Stecklow, as I usually do.

18 Go ahead.

19 MR. LONDON: CCRB interviews the officers and the
20 officers are made to bring their memo books to CCRB so CCRB can
21 make copies. Every police officer knows that. And memo books
22 are kept with the police officer 24 hours a day.

23 So, the police officers bring in their memo books,
24 they know they're being interviewed for an incident. If
25 Officer Connizzo wants to cover up where he was he can easily

Jl85hurC

conference

1 say I checked out at 12:00 -- which is what he wrote in his
2 memo book. If the CCRB did any investigation at all, the first
3 thing they would have said is let's look at the roll call,
4 let's see when he signed in and signed out. Did CCRB do that?
5 No. And when we subpoenaed the roll call years after the
6 incident we found the fact that Connizzo never signed out when
7 he said he did.

8 So, CCRB did no investigation except for the one fact
9 of interviewing him Connizzo says it wasn't me, here is my memo
10 book that I have on me at all times, I signed out at 12:00.
11 When the roll call, which is locked inside an office which CCRB
12 could easily have gotten, they didn't even look at. So, for
13 the jury to hear that CCRB's findings were that it is
14 unsubstantiated against them because they told us they weren't
15 there and the memo book checks out is just self-serving. The
16 first investigation CCRB would have done is let's look at the
17 roll call and they didn't even do that and that's why I think
18 the statements are self-serving as Mr. Stecklow explained.

19 THE COURT: Under Rule 8038(C)(i), a report is not
20 excluded by the hearsay rule if it sets forth factual findings
21 resulting from an investigation made pursuant to authority
22 granted by law, unless the sources of information or other
23 circumstances indicate lack of trustworthiness. A party
24 opposing the admission of evidence has the burden of showing
25 untrustworthiness. Before the Court can presume

Jl85hurC

conference

1 trustworthiness, it must determine that the report contains
2 factual findings based on a factual investigation. It is the
3 methodology of factual investigation which provides a threshold
4 safeguard against untrustworthiness. This is found in the
5 *Ariza* case, 139 F.3d 132 at 134.

6 I have reviewed the CCRB report and it is apparent to
7 me that, contrary to the assertions made, the findings and
8 recommendations set forth on pages 4 and 5 are supported by an
9 investigation. The documents reviewed include documents from
10 the 41st Precinct, the 43 Precinct, an MISD check and New York
11 State trooper check, the 42nd Precinct documents. They looked
12 at the stop, question, and frisk log, they looked at the fleet
13 services request, the daily vehicle assignment sheet, the roll
14 call for two or three -- the roll call for two or one on July
15 2nd or two or three on July 1, and similar documents reviewed
16 in the 43rd Precinct, as well as documents in PSA-7 and 8, the
17 patrol borough Bronx anti-crime unit, the narcotics bureau
18 Bronx unit, Bronx gang, and they investigated that.

19 Now, that only goes to whether there was an
20 investigation which has indicia of trustworthiness. That's not
21 to say that the investigation and its outcome is binding in any
22 way and, in fact, the Court plans to give a cautionary
23 instruction and invites the parties to submit proposed
24 instruction before receiving the CCRB investigation into
25 evidence. It's not binding, it is simply a piece of admissible

Jl85hurC

conference

1 evidence and I will allow it into evidence at trial. I do not
2 conclude at this stage that the probative value of either the
3 report or any portion of the report is substantially outweighed
4 by any of the factors mentioned in Rule 403.

5 Electronic sign-in sheet --

6 MS. SMITH-WILLIAMS: Sorry, your Honor. Can I have
7 clarification of your Honor's last ruling?

8 THE COURT: Yes.

9 MS. SMITH-WILLIAMS: So, is the ruling that the
10 finding as well as plaintiff's, what he intends to introduce
11 about how --

12 THE COURT: The entire document can come in.

13 MS. SMITH-WILLIAMS: Thank you, your Honor.

14 THE COURT: And under the adoption of completeness, if
15 any portion is offered it all should come in at the same time?

16 MR. STECKLOW: Your Honor, would that apply to any
17 part of the CCRB documents or just the five-page
18 recommendation?

19 THE COURT: No. Just the recommendation, period. The
20 documents themselves don't come in. They may come in under
21 some other theory independently but the full document wouldn't
22 come in.

23 MR. STECKLOW: So, for clarity purposes, I believe
24 that's on the docket currently at 115-3 unredacted.

25 THE COURT: 115-3. That's what I reviewed, 115-3.

J185hurC

conference

1 And I know you have your redacted version --

2 MR. STECKLOW: It was 115-4.

3 THE COURT: Yes, I see it. Yes.

4 Okay, electronic sign-in sheet --

5 MR. STECKLOW: Judge, we can help you with this one.

6 We are withdrawing our objection.

7 THE COURT: Okay. So that's in.

8 Awards and commendations. Defendants assert that they
9 do not intend to introduce any such evidence, so that's
10 disposed of.

11 Qualified immunity. There is no reason why the words
12 "qualified immunity" should come out of anybody's mouth in
13 front of a jury, period, and I don't understand the defendants
14 to urge otherwise. Am I correct?

15 MS. WILSON: That is correct, your Honor.

16 THE COURT: It is the defendant's burden to prepare
17 questions that you believe are relevant to the issue of
18 qualified immunity. I will look at them and hear from
19 plaintiff's counsel, but even if I ask the question to the
20 jury, it doesn't mean that a particular answer to the question
21 will amount to qualified immunity or won't amount to qualified
22 immunity. That's going to be a matter for subsequent briefing.
23 But, as I have come to learn, that is the practice recommended
24 by the Court and followed by this Court in the *Bah* case and in
25 other cases. *Bah* is an example of where the questions

Jl85hurC

conference

1 advocated by the City were asked, in some instances they got
2 the answers they wanted but the Court concluded that they did
3 not warrant qualified immunity.

4 So, that's an issue for down the road except for the
5 framing of questions to the jury.

6 MR. STECKLOW: Your Honor, I respectfully disagree
7 with a little bit of the rulings. I just wanted to state that.
8 I think there is a distinction between this case and the *Bah*
9 case. I believe the *Bah* case is a shooting case, that there
10 was no question of the shooter, of the police officer that shot
11 the individual.

12 THE COURT: Right.

13 MR. STECKLOW: And that in this situation the
14 defendant officer is saying it's not me. And what we are
15 asking the Court to rule -- and obviously I understand we are
16 not going to get this ruling -- is that you can't in one part
17 of your mouth say it's not me, I didn't do it, and in another
18 part say but if it was me, I didn't mean to do it which would
19 be the QI type of argument.

20 THE COURT: Well, qualified immunity applies to state
21 law claims; is that right?

22 MR. STECKLOW: I don't believe so, your Honor. It
23 only applies to federal claims.

24 MS. SMITH-WILLIAMS: There is qualified immunity in
25 both context, your Honor, so both in the federal context and

Jl85hurC

conference

1 governmental immunity which is basically the equivalent of
2 qualified immunity in the state law context.

3 THE COURT: Mr. Stecklow, you are free to brief this.
4 I don't want to hold you to your answer right here and now or
5 bind anybody by their answer here but I think that's the case,
6 that it applies as well to the state law claims. And, of
7 course, one of your state law claims is that some officer, not
8 necessarily an identified officer, engaged in unlawful or
9 tortious conduct for which the City is liable on the theory of
10 respondeat superior. In that context I would think the City
11 could urge the issue of qualified immunity. If one of their
12 officers acted in that context, then reasonable officers could
13 disagree.

14 MR. STECKLOW: I will do that research, your Honor.

15 THE COURT: The other thing is whether I am even going
16 to give the questions is up for grabs. I have to hear the case
17 and you will have an opportunity to argue it.

18 MR. STECKLOW: From what you just explained, your
19 Honor, it sounds like you don't believe qualified immunity
20 would go in on the federal claim because he is denying he did
21 it but it could go in on the said claim because --

22 THE COURT: I didn't decide that yet.

23 MR. STECKLOW: That's what I'm asking.

24 THE COURT: Well, I didn't decide that yet. I gave
25 you an example of where the questions would apply. That was

Jl85hurC

conference

1 not an indication of a ruling that it doesn't apply in the 1983
2 context.

3 MR. STECKLOW: Okay.

4 THE COURT: I will try and watch my words more
5 carefully for you.

6 MR. STECKLOW: No, no. I don't mean disrespect
7 obviously. That's why I asked the question.

8 THE COURT: I don't think it was disrespect but I
9 guess I have to be very careful with my language.

10 I was simply giving you an example of where the
11 questions, that would be put to a jury on qualified immunity
12 might be appropriate and, as I previously said, an answer to
13 the question means nothing until there is briefing on it and
14 whether it does or it doesn't constitute a defense to the 1983
15 claim would be a matter decided after trial. I wouldn't ask
16 the jury, for example, only with respect to the assault and
17 battery claim and not with respect to the 1983 claim, did this
18 happen. The question that's asked may relate to the conduct of
19 the plaintiff and not even the conduct of a defendant. That
20 sometimes happens in qualified immunity cases.

21 So, I don't think it's -- I'm glad you raised that
22 because I would hate to think that two months from now a
23 snippet of language that came out of my mouth is going to be
24 cited as a ruling that qualified immunity does not apply to the
25 1983 claim when I never said any such thing.

J185hurC

conference

1 So, I actually thank you for that and if there is
2 anything you have a doubt about or the City, I would appreciate
3 your raising this --

4 MR. STECKLOW: Your Honor, just --

5 THE COURT: -- now so I don't get it two months from
6 now as to some statement out of context.

7 MR. STECKLOW: Understood, your Honor, and I do not
8 intend or plan to take your Honor's words out of context.

9 THE COURT: I understand.

10 MR. STECKLOW: But point five does not seek any ruling
11 on state claim, solely about Connizzo and federal claims. I am
12 sure the Court knew that when they read it at the time, it is
13 not what we are discussing right now. I just wanted to point
14 it out.

15 THE COURT: But now I'm going to respond to that and
16 I'm going to go back and say what I said. With regard to
17 questions that are asked on qualified immunity, they are not
18 questions relating to a claim. Now how, as a matter of
19 evidence or argument before the jury, is 5 a matter to be
20 decided? Can you tell me that, Mr. Stecklow.

21 MR. STECKLOW: No, your Honor. I believe you already
22 stated it accurately. I don't think that I -- what our
23 application was was for the Court to rule now, based on the
24 position Connizzo is taking, that QI I wouldn't apply not now,
25 not after the jury comes back, not after the evidence in.

Jl85hurC

conference

1 THE COURT: How is that an *in limine* motion? That
2 sounds to me like a summary judgment motion.

3 MR. STECKLOW: I understand the Court's position. I
4 don't think I have an answer that I would like to proffer right
5 now for it.

6 THE COURT: Because that's what I think I'm here doing
7 right now, is ruling on what argument can be presented to the
8 jury or can't be presented to the jury, what questioning can be
9 engaged in or can't be engaged in, what comments can be made at
10 trial in front of the jury, and what evidence can be admitted
11 and can't be admitted, not on what claims can go to the jury
12 and not on what defenses that are adjudicated after a trial can
13 be urged.

14 MR. STECKLOW: Understood, your Honor. Thank you.

15 THE COURT: Now, with regard to defendant's first *in*
16 *limine* regarding the City's role, am I correct that the
17 plaintiffs have no intention of mentioning or eliciting
18 evidence or making any reference to indemnification of anyone
19 by the City? Am I correct about that?

20 MR. STECKLOW: Obviously, your Honor, if we get to
21 punitive damages there is going to be questions about indemnity
22 so that the jury would understand that if they're going to give
23 punitive damages it is not going to come out of Officer
24 Connizzo's pocket. Outside of that specific situation, I don't
25 believe there is any reason for indemnification to be

Jl85hurC

conference

1 mentioned.

2 THE COURT: Well, is that correct?

3 MR. STECKLOW: Is it correct that it should be
4 mentioned at that point?

5 THE COURT: No. Is it correct that if a jury finds
6 conduct that warrants punitive damages it doesn't come out of
7 the officer's pocket.

8 MR. STECKLOW: Yes, your Honor; that is correct.

9 THE COURT: Where does that come from? Do you have
10 some support for that?

11 MR. STECKLOW: I believe you have it, your Honor, and
12 I saw it in a transcript I read from -- I read it in the case
13 of *Feeley v. City of New York*. It wasn't in that case where it
14 occurred but it was in that case that the argument was made and
15 the evidence was brought to your attention about it.

16 THE COURT: What was the evidence? Refresh my
17 recollection.

18 MR. STECKLOW: There is evidence that I believe it was
19 Mr. Rothman's case and Mr. Rothman showed you evidence from a,
20 I believe, Judge Scheindlin case where that was allowed -- not
21 that it was allowed, he put stuff, documents on the docket that
22 showed the City always indemnities for punitive damages, always
23 indemnities for all of these claims and that, based on that, I
24 believe you said in that case that you would bifurcate punitive
25 damages if it came to it.

J185hurC

conference

1 THE COURT: Well, do you have that evidence? Because
2 that's news to me. I am not even sure that's lawful. Is it
3 lawful to indemnify someone for punitive damages?

4 MR. STECKLOW: I would imagine if the City is doing it
5 it would be lawful.

6 THE COURT: I don't know. I'm not sure. Where do I
7 find this? What's the docket number of the Judge Scheindlin
8 case?

9 MR. STECKLOW: What I have is the index number for the
10 *Feeley* case and I believe --

11 THE COURT: I know the *Feeley* case well.

12 MR. STECKLOW: Right. I believe it was in that case
13 that Mr. Rothman put the documents in front of you.

14 THE COURT: From Judge Scheindlin's case.

15 MR. STECKLOW: I believe it was Judge Scheindlin's
16 case.

17 THE COURT: So, I was going to go right to Judge
18 Scheindlin's case and look at the statement by the City -- and
19 it is a statement by the City?

20 MR. STECKLOW: Yes.

21 THE COURT: That they always indemnify for punitive
22 damages?

23 MR. STECKLOW: I believe it was various documents he
24 received and I'm not sure if it was from FOIL or otherwise.

25 THE COURT: Let me ask the City. Does the City always

Jl85hurC

conference

1 indemnify people for punitive damages?

2 MS. SMITH-WILLIAMS: Your Honor, there is no decision
3 made for indemnification until there is a finding of liability
4 in the first instance. So, to suggest to the jury that the
5 City would automatically indemnify Sergeant Connizzo or any
6 other officer that allegedly participated, is just simply
7 incorrect.

8 MR. STECKLOW: Judge, the case I'm finding in the
9 transcript of your conference with Mr. Rothman was *Gyasi*, and
10 that he says he -- what I put in there as an exhibit is a
11 transcript from a hearing *Gyasi* before Judge Scheindlin.

12 THE COURT: Do you have the document number of *Gyasi*
13 case? What I am trying to figure out is is this something the
14 City did in times long ago and maybe got caught doing it and
15 stopped it, or someone else became mayor and put an end to it,
16 or someone else became Corp Counsel and put an end to it.

17 So, let me find out from them. Are you planning on
18 referring to indemnification of officers by the City. That's
19 the question?

20 MR. STECKLOW: We don't plan on doing that, your
21 Honor. I was raising it solely in the punitive damage claim.
22 If it in fact comes up, I would think at that point it would be
23 appropriate to let the jury know that -- and it is only if I
24 can now correlate and put together, collate these documents and
25 put it in front of you.

Jl85hurC

conference

1 THE COURT: All right. You may not make any reference
2 to indemnification of anyone by the City absent further order
3 of this Court.

4 MR. STECKLOW: Understood, your Honor.

5 THE COURT: And you may refer to counsel for the
6 defendants as counsel for the defendants and not by the
7 reference to the City's attorneys. All right?

8 MR. STECKLOW: Yes, your Honor.

9 THE COURT: Now, with regard to the defendant's
10 argument that the City should be removed from the caption, it's
11 not, quite frankly, an *in limine* issue but it does go to
12 perhaps the jury instructions and this does not appear to be
13 the kind of a case where one might say if the plaintiff
14 prevails under 1983 action then necessarily the plaintiff has
15 prevailed on the state law claim and therefore if the City
16 agrees that it will be libel on a respondeat superior claim
17 basis for any finding against the officer, then the plaintiff
18 may wish to take that stipulation along with an agreement to
19 delete the City from the caption. But that's not this case.

20 This is a case where one of the theories advanced by
21 the plaintiff is that officers not identified -- alternatively
22 officers not identified assaulted the plaintiff for which the
23 City is responsible under respondeat superior. So, that claim
24 makes no sense unless the jury understands that it's a
25 respondeat superior claim against the City. So, that's denied.

Jl85hurC

conference

1 With regard to the notice of claim requirement, is
2 there anything the City wishes to add to its papers or the
3 defendant wishes to add to its papers?

4 MS. WILSON: We have nothing to add, your Honor.

5 THE COURT: Anything the plaintiff wishes to add?

6 MR. STECKLOW: I'm sorry, Judge. Are we on point 2
7 now?

8 THE COURT: This is the notice of claim argument with
9 regard to Section 50E.

10 MR. STECKLOW: Your Honor, we believe that the
11 standard that exists for these notice of claims have been
12 satisfied here. The purpose is to give municipalities adequate
13 notice in a timely manner to investigate and, when appropriate,
14 settle in pretrial. That is what they have had here. This is
15 a case that's been, saw an IAB investigation and the CCRB
16 investigation. It is one where the City has vehemently
17 defended the case and litigated it. So, the purpose and the
18 intent of the notice of claim statute has clearly been
19 satisfied and I believe that because of that we should not be
20 precluded from seeking to have Connizzo held responsible via
21 the notice of claim.

22 THE COURT: I reviewed the notice of claim which is an
23 exhibit to the Wilson declaration and I have reviewed it in the
24 context of the requirements. The requirement is that any case
25 found upon a tort against the City or its employee, a plaintiff

Jl85hurC

conference

1 must file a notice of claim within 90 days of the incident.

2 The purpose here is to give the municipality an adequate
3 opportunity to investigate the claim and to settle claims
4 without expense and litigation risks and not every claim need
5 be set forth, *in haec verba*, as long as the details pertaining
6 to such a claim are described sufficiently with respect to
7 time, place and manner, to enable the City to investigate the
8 claims.

9 Here, Exhibit A to the Wilson declaration, gives the
10 date, approximate time of the incident, and states that as yet
11 unidentified NYPD officers seized and battered, hurt without
12 cause. It alleged injury to hurt's hand, shoulder, arms, torso
13 and legs and stated that the injuries were caused by
14 intentional reckless and negligent acts of the City, its agents
15 and employees, though did not identify Connizzo by name. The
16 notice of claim provided sufficient detail for the defendants
17 to investigate the bases of Hurt's claims.

18 So, I conclude that the argument is without merit and,
19 further, I note this is not properly raised as an *in limine*
20 motion, this is a summary judgment argument and on that basis
21 alone I deny the application.

22 With regard to disciplinary histories, let me hear
23 from the plaintiff: What do you have on a disciplinary history
24 of any officer that you seek to offer in this trial?

25 MR. STECKLOW: We don't seek to offer any, your Honor.

Jl85hurC

conference

1 THE COURT: Thank you.

2 Now, there are arguments raised as to, let me in the
3 first instance take plaintiff's mother and father, and it seems
4 to me that I have to hear the testimony before I know what is
5 admissible and what is not admissible. I will require the
6 plaintiff to identify any claimed excited utterance statements
7 or statements by the plaintiff which you seek to introduce
8 through the mother or the father.

9 Are there any?

10 MR. STECKLOW: Yes, your Honor.

11 I believe we are going to have at trial both parents
12 explaining what happened when they got to the scene and picked
13 their son up and took him to the hospital and how he recounted
14 the story to each of them, I believe separately, in those
15 moments.

16 THE COURT: Well, it seems to me that the testimony of
17 the parents is appropriate as to what they saw, what they
18 observed, whether they saw any swelling or whether they saw any
19 bleeding or whether, as parents, they thought their son was
20 unusually distressed going to the garden variety emotional
21 damages. I think that is fair grounds for testimony but on
22 what basis would an out-of-court statement by Mr. Hurt to his
23 parents be admissible?

24 MR. STECKLOW: Your Honor, I believe it comes in under
25 the excited utterance exception.

J185hurC

conference

1 THE COURT: That's what I asked you in the first
2 instance, is do you have any statements that you seek to offer
3 under the excited utterance.

4 MR. STECKLOW: And I think that's why I said to you
5 that those are the ones that he told his parents when they
6 picked him up.

7 THE COURT: So, what is the statement?

8 MR. STECKLOW: We don't have specific words to recount
9 to you here. The defense did not depose these individuals
10 although you gave them extra time, extended discovery to do so.

11 THE COURT: I'm asking you -- this is the final
12 pretrial conference -- what other statements that you seek to
13 admit under the excited utterance exception to the hearsay
14 rule.

15 MR. LONDON: I have spoken to both the mother and
16 father, Judge. I don't have word-for-word, but the sum and
17 substance of the statements are the mother arrives first, the
18 son hugs the mother and he says, *Oh my God. Thank God you are*
19 *there. I thought I was going to die. And, I'm fine, I'm fine.*
20 *Thank God I'm fine.*

21 Then, the father pulls up. The father is actually on
22 the phone with the police department trying to find out what
23 happened and the father gets out and James said, *oh my God. I*
24 *thought I was going to die. Thank God you're here. I'm fine,*
25 *thank God I'm glad you guys are here. Let's go to the*

Jl85hurC

conference

1 *hospital.*

2 That's the sum and substance of it but they haven't
3 been formally deposed.

4 THE COURT: That, offhand, presents a problem to me.
5 We will hear the testimony question by question and hear the
6 answers but if there was any thought that the parents were
7 going to recount a narrative of the events of the day, that's a
8 different story.

9 Now, tell me what Ms. Green is going to be testifying
10 to.

11 (Counsel conferring)

12 MR. STECKLOW: Sorry, your Honor, we were having a
13 little discussion here.

14 THE COURT: That's fine.

15 MR. STECKLOW: I would like him to recount to you --
16 the fact what you said that you don't think is going to happen,
17 I do think statements were made to the parents from James about
18 what happened and I do believe it comes under the excited
19 utterance exception and I believe that Judge Scheindlin gave a
20 very good analysis of this in U.S. v. Del Rey which I have here
21 without a cite -- 275 F.Supp.2d 412 starting on page --

22 THE COURT: What volume of F.Supp.2d?

23 MR. STECKLOW: 275 F.Supp.2d 412, a 2003 case.

24 THE COURT: Now, have you spoken with the parents?

25 MR. STECKLOW: I have spoken to them but not recently.

Jl85hurC

conference

1 Mr. London has been preparing the trial testimony.

2 THE COURT: Well, for the moment my ruling stands and
3 if there is any indication that they now remember some
4 narrative that they want to get in, you are not to elicit that
5 testimony without first addressing it with me at the side bar.

6 MR. LONDON: So then I will speak to Ms. Marquez and
7 to James Hurt, Sr. and get specifically exactly the narrative.

8 THE COURT: No, no, no. You talked to them -- this is
9 not a game. You talked to them and you told me what you
10 believed they were going to testify to. I accept that at face
11 value. I am not urging you to go and say, so, what's the
12 narrative your son told you?

13 MR. STECKLOW: Your Honor, I'm sorry.

14 When we were talking just now, he said once James was
15 in the car on the way to the hospital, that's when he told the
16 story, and I said my opinion is that is still excited utterance
17 and that's what we want to present to the Court.

18 THE COURT: You can give me letter briefing on that
19 but you are not to elicit that until you get a ruling from me
20 otherwise.

21 MR. STECKLOW: Yes, your Honor.

22 THE COURT: My question was about Ms. Green so can we
23 get back to my question?

24 MR. STECKLOW: Yes, your Honor.

25 THE COURT: Are you going to call Ms. Green?

Jl85hurC

conference

1 MR. LONDON: At this point Ms. Green -- we are not
2 going to be calling Ms. Green, your Honor, but can I have a
3 clarification on the ruling?

4 THE COURT: Yes.

5 MR. LONDON: His mother is the first one who arrives
6 and he has a conversation with his mother, and then the father
7 pulls up and the father is on the phone with the police. And
8 he gets in the car with the father and the father drives them
9 to the hospital in Westchester. The conversation between James
10 and his father in the car, are you saying where James is
11 telling his father what happened because the mother wasn't in
12 the car with them, just the father was, are you saying that
13 testimony is not allowed?

14 THE COURT: As of the moment.

15 MR. LONDON: Okay.

16 THE COURT: Correct, as of the moment.

17 Now, with regard to the patrol guide, I think
18 Ms. Wilson probably would give you my ruling. You have
19 probably heard it from me. If you haven't, your colleagues
20 certainly.

21 MR. STECKLOW: I have heard it, Judge.

22 MS. WILSON: I am sure that my colleagues have but I'm
23 not certain what your Honor's ruling will be.

24 THE COURT: Okay. So, the plaintiff can reference the
25 patrol guide. The patrol guide does not set a floor or a

Jl85hurC

conference

1 ceiling on officers' conduct. It is not the standard under
2 Section 1983 or even under the state law claims. It is a
3 guidance document and it does not provide a basis for liability
4 but that is not to say that a witness can't be questioned about
5 the patrol guide. And I probably will be very active in
6 instructing the jury as to what the patrol guide does and does
7 not permit them to do. They can hear the testimony but
8 complete compliance with the patrol guide does not insulate
9 someone from 1983 liability. By the same token, disobeying or
10 not following the parole guide does not give rise to
11 Section 1983 or other tort liability.

12 MR. LONDON: Can I have one more clarification ruling?

13 THE COURT: Sure.

14 MR. LONDON: So, the mother, Ms. Marquez, received a
15 phone call from Ms. Lopez who will not be testifying,
16 Ms. Ashley Lopez, James' -- the plaintiff's ex-girlfriend. Can
17 I elicit from the mother that she received a phone call from
18 Ms. Lopez, who was very upset, because she was on the phone
19 face-timing with James when this happened and the police pulled
20 him over and what she told James' mother and also James to
21 testify that he was on the phone with her after the incident
22 for a few minutes before his phone died.

23 THE COURT: I know that you are aware of this, that an
24 out-of-court statement offered for the truth of its content
25 falls within the hearsay ruling. What exception to the hearsay

J185hurC

conference

1 rule do you contend the statements made by Mr. Hurt to
2 Ms. Lopez or Ms. Lopez to the mother or Mr. Hurt to the mother,
3 falls within an exception of the hearsay rule?

4 MR. LONDON: It is excited utterance to complete the
5 narrative and to explain why the mother took the steps she did
6 after speaking to Ms. Lopez.

7 THE COURT: I'm not going to allow that testimony.
8 You can provide me with further briefing on the subject but you
9 are not to elicit the testimony without a further ruling from
10 the Court.

11 MR. LONDON: Can the mother at least testify she
12 received the phone call?

13 THE COURT: Absolutely.

14 MR. LONDON: Okay.

15 THE COURT: That's not an out-of-court statement
16 speaking for the truth of its content. I'm not really going to
17 get into all the things that you will be allowed to do at trial
18 but there are many things, okay, and Mr. Stecklow will guide
19 you and I am sure he is going to participate in the trial and
20 it will all be fine.

21 You are going to have to explain the trip program
22 and -- well, further let me just cut to the chase. Do the
23 plaintiffs intend to offer any evidence concerning a trip
24 program?

25 MR. LONDON: No, your Honor.

Jl85hurC

conference

1 THE COURT: Okay, so that's done.

2 And what do the plaintiffs expect to elicit from
3 Lieutenant Paytner?

4 MR. STECKLOW: Your Honor, if we are able to submit
5 part of the CCRB investigative report -- not the recommendation
6 but another document, we wouldn't have to call Lieutenant
7 Paytner. If we were able to get a stip done we wouldn't call
8 him.

9 Basically, if the Court recalls, early on at one point
10 in this case in chambers you expressed that one of three things
11 happened here. Either cop impersonators did this, either the
12 cop is lying or either your client is lying. And one of them
13 was investigated by the CCRB and it was cop impersonator -- and
14 they have a special unit that investigates police
15 impersonation. And they went to them and they said this
16 doesn't line up with anything we have seen, it is not
17 consistent with anything and they knocked that off.

18 That's all we want to present to the jury; that you
19 are hearing two people, you are going to believe one of them,
20 there is not a third option.

21 THE COURT: Is this an investigative report of some
22 sort?

23 MR. STECKLOW: Yes, your Honor.

24 THE COURT: I haven't seen it so I have not anything
25 to say on it at this stage and I will reserve until I hear

J185hurC

conference

1 more.

2 MR. STECKLOW: In the JPTO, your Honor, but I
3 understand you haven't seen the document.

4 THE COURT: I don't think the documents have been
5 supplied.

6 MR. STECKLOW: I don't think it has been.

7 THE COURT: Evidence of injury. Defendants argue that
8 plaintiff should be precluded from offering evidence of
9 injuries to the forearm and finger because he cannot
10 demonstrate that they were the results of excessive force. It
11 cannot be argued, says the defendants, that plaintiffs jumping
12 over a fence resulting in lacerating his forearm and injuring
13 his finger was a reasonably foreseeable consequence of the
14 officers' alleged chase of plaintiff.

15 The plaintiffs did not think much of this argument and
16 I don't quite follow the logic. The plaintiff can testify to
17 his injuries and how they were caused and there will be,
18 presumably, a jury question whether they were reasonably
19 foreseeable consequences of the tortious conduct or whether
20 there otherwise is a nexus between the injury and the conduct.
21 Those are questions for the jury to sort out.

22 At this stage, the notice of claim does not come in to
23 evidence. It may be that somebody may open a door, which would
24 enable the plaintiffs to use the notice of claim or for the
25 defendants to use the notice of claim but until that happens,

Jl85hurC

conference

1 it does not come in and consistent with what I have said
2 previously, the Rule 56.1 statement does not come in.

3 Now, let me hear about the demonstrative video.

4 MR. LONDON: Yes. This is completely my mistake. I
5 totally forgot to bring it. I have a 4-month-old child at
6 home, it is sitting at my desk. I can drop it off at the court
7 tomorrow. I think your Honor should watch it before you make
8 any ruling. Basically it is someone who spoke to the witness,
9 who read the deposition transcripts, and who made a video. And
10 all of the arguments I am not going to repeat that we put in
11 our brief for why we think it will be -- I will let
12 Mr. Stecklow make --

13 THE COURT: What do you plan to do with the video?

14 MR. STECKLOW: We plan to show it to the jury, I
15 believe, after -- after Mr. Hurt's testimony or in the closing.
16 As the Court knows and the case we cited in our papers is
17 *Morency v. Annucci*, tests for admissibility for computer-edited
18 demonstrative evidence remains the same as that as judicial
19 exhibits, it is probative versus prejudicial. Here we are
20 arguing to the Court that this could not be prejudicial because
21 the plaintiff will be here to testify to whatever is in the
22 video and so it is not to appeal to the jury's emotions. In
23 some ways we believe this might even be considered best
24 evidence because there is no surveillance video so it has had
25 to be recreated. It is probative because it gives a concise

Jl85hurC

conference

1 visual representation to the jury in real-time that would
2 otherwise be impossible. We can set a foundation but having
3 the individual come in who created it and explain how it was
4 created as far as where he got the information and how he can
5 testify that it's accurate and Mr. Hurt can testify that it's
6 accurate.

7 Your Honor, I will be honest. This is the first time
8 I have tried to used demonstrative evidence like a video and I
9 found the law, I understand the standard and the testing and we
10 are submitting it. I do believe, as Mr. London said we need to
11 give it to the Court to look at in order for the Court to make
12 a ruling, but that's our argument.

13 THE COURT: Let me hear from the defendants.

14 MS. WILSON: Your Honor, the defendants' main
15 objection to this demonstrative exhibit is the fact that it
16 purportedly recreates these events but they're just based on
17 plaintiff's version of events and certain aspects of
18 plaintiff's version of events are emphasized, whereas certain
19 aspects are deemphasized. For example, where plaintiff gets
20 his finger caught in the fence is emphasized. Additionally,
21 there is no demonstration that it is a fair and accurate
22 representation of the events or of the area as of the time of
23 the incident. Plaintiff has never fully described where,
24 exactly, the fence was located or what that fence looked like.
25 Additionally, there are certain questions of the amount of time

Jl85hurC

conference

1 that it takes. For example, there is some number of seconds
2 are elapsed in the time period where the livery car is being
3 followed by the police car and then a very short amount of time
4 elapses in the depiction of the events as plaintiff purports
5 them to have occurred.

6 So, we would argue that it is more prejudicial than
7 probative.

8 THE COURT: I will look at the video and I may have to
9 have a hearing on it. So, there you are. But I am reserving
10 decision.

11 So, we don't have a trial date set in this case.

12 MR. LONDON: Your Honor.

13 MR. STECKLOW: We think we do.

14 THE COURT: We do. All right.

15 MR. STECKLOW: We think we have February 4th as a
16 trial date in this case.

17 THE COURT: Wonderful. That's terrific. Good.

18 MR. LONDON: Does the Court think there is any reason
19 that it might be delayed because of other things going on or we
20 should plan accordingly? Because I did have a trial that was
21 supposed to start yesterday that was cancelled.

22 THE COURT: Well, I'm not very good on weather
23 prognostication but I do know that at some points this time of
24 year we do get weather issues.

25 MR. LONDON: I meant with the government shutdown.

Jl85hurC

conference

1 THE COURT: Well, I will tell you right now, we are
2 not doing civil jury trials if the government shutdown
3 continues.

4 MR. STECKLOW: Is January 11th the cutoff date that I
5 have read, your Honor?

6 THE COURT: Well, it's not really a cutoff date but
7 January, now it looks like it is January 18th, is when the
8 federal judiciary will run out of money for paying salaries.
9 That's what I understand. And with regard to civil jury
10 trials, I believe the last indication I had is there will not
11 be civil jury trials during the period of the shutdown and, in
12 fact, I don't believe our jurors are paid after the 18th.

13 But the information, I want to quickly add, the
14 information is fluid. I get e-mails nearly every day and I can
15 do this for you. I can have a drop dead date here of, if the
16 parties want of, let's say, have you come in on January 30th
17 and if we don't have clarity by that date I will pull the plug.

18 MR. STECKLOW: Okay.

19 THE COURT: If we have clarity by that date, you will
20 know.

21 MR. STECKLOW: If we have clarity by that date then we
22 don't need to come in on the 30th, or do you want to have
23 another conference before the trial, your Honor?

24 THE COURT: Why don't we do this. We are going to set
25 it for a conference for 2:15 on January 30th. If there is

Jl85hurC

conference

1 clarity, I will vacate the conference and you will know. If
2 there is a lack of clarity, it is probably worth your while to
3 come in.

4 One of the options I should mention, is that I have a
5 criminal case on February 25th and I don't know whether it's
6 going, I can't be sure that it's going to go because I can't
7 ever be sure and I could set you as first backup to that case.
8 That's a possibility. Because then it gets a little bit more
9 difficult for a while.

10 MR. STECKLOW: Judge, we are both good, both sides are
11 good if you want to put us as backup for the 25th as of now.

12 THE COURT: That's what I will do. I am going to put
13 this down in the event that we can't go forward on the 4th, you
14 will be first backup to 18 crim 259.

15 MR. STECKLOW: 18-259. Thank you, your Honor.

16 THE COURT: Yes. And we will see what happens.

17 MS. WILSON: Your Honor, I just wanted to raise a
18 couple of questions on the defendant's motions *in limine*.

19 THE COURT: Yes. Sure.

20 MS. WILSON: As to point 11, I know that there was a
21 ruling regarding the CCRB reports and findings --

22 THE COURT: Right.

23 MS. WILSON: -- when we were discussing plaintiff's
24 motions *in limine* but I don't believe that there was a ruling
25 regarding the, any IAB findings.

Jl85hurC

conference

1 THE COURT: What IAB findings were there and where are
2 they reflected?

3 MS. WILSON: I think the IAB findings were confined
4 largely to incidents to -- hold on one second, your Honor?

5 THE COURT: These are the exhibits that have never
6 been furnished to me, 214? 224? I have never seen them so I
7 don't really have any opinion on the subject. If somebody
8 wants to furnish them to me at some point before trial, I could
9 probably --

10 MR. LONDON: I can bring them in tomorrow, too, when I
11 drop off the video.

12 MS. WILSON: That would be fine with defendants, your
13 Honor. Thank you.

14 THE COURT: Your argument is they should be excluded?

15 MS. WILSON: Yes. That is correct, your Honor.

16 THE COURT: Why?

17 MS. WILSON: I'm sorry. I have a lot of paper in
18 front of me.

19 I think that this is returning to the topic of the
20 police impersonation and I think that we would want these
21 documents to be excluded because as of this point, defendants
22 aren't making any argument that there -- aren't proposing a
23 defense that there was police impersonation and we think that
24 the introduction of that evidence would simply be confusing to
25 the jury and we don't think that it's necessary and probative.

Jl85hurC

conference

1 THE COURT: Well, something you said raises a question
2 in my mind on the police impersonation point. Your theory of
3 the case is what then?

4 MS. SMITH-WILLIAMS: Your Honor, our theory of the
5 case is neither Sergeant Connizzo, nor any other NYPD officer,
6 engaged in the alleged acts that plaintiff is alleging
7 essentially.

8 THE COURT: So, are you going to argue to the jury
9 that the plaintiff made up the story or are you going to say we
10 don't know whether he made it up but it didn't involve our
11 people.

12 MS. SMITH-WILLIAMS: Probably the latter, your Honor.

13 THE COURT: If it is the latter, isn't that the
14 impersonation defense?

15 MS. SMITH-WILLIAMS: I don't know that we intend to
16 essentially affirmatively state that there was some
17 impersonators but I guess, your Honor, that the inference can
18 be made. Yes.

19 THE COURT: So that's why that particular argument
20 doesn't have a lot of appeal, to me at least, because the
21 plaintiff is trying to negate an inference that you would like
22 the jury to draw and they want to come forward with evidence
23 to, in essence, have something to argue to the jury with; to
24 say no, that inference is not a reasonable inference, this was
25 investigated and there is no evidence of this, following the

J185hurC

conference

1 modus operandi of impersonators.

2 Now, I haven't looked at these documents, I don't
3 otherwise have an opinion, but the argument that, well, we are
4 not going to argue police impersonation therefore police
5 impersonation documents don't come in, doesn't really seem to
6 carry much weight, as far as I'm concerned.

7 MR. STECKLOW: Your Honor, I found --

8 MS. SMITH-WILLIAMS: I understood, your Honor. If I
9 could just finish my point?

10 THE COURT: Yes.

11 MS. SMITH-WILLIAMS: So, I do think, though, that if
12 the issue of police impersonation is going to come out whether
13 or not through any inference that could be made on the
14 evidence, I think it is confusing for the documents to actually
15 be given to the jury. They are getting a document saying that
16 there was no investigation that they were aware of at the time.
17 I think in that instance that maybe it makes more sense to have
18 Lieutenant Paytner testify as plaintiff initially requested as
19 part of their witness list so we would withdraw any objection
20 to that.

21 THE COURT: Well, I think what you really ought to do
22 here is get me a letter brief on this. I'm going to get a
23 letter brief on the video from the plaintiffs, right? Is there
24 anything you want to add or are you happy, you have said
25 everything you want to say?

J185hurC

conference

1 MR. STECKLOW: I think I have said everything on the
2 video. We will just give you the video, Judge.

3 THE COURT: So, I will take a letter brief from the
4 defendants on this issue of why these documents shouldn't come
5 in.

6 MR. STECKLOW: Alternatively, your Honor, we would
7 love to enter into a stip that the police, that there is a
8 specific -- whatever the language is but that it is not police
9 impersonation and the police investigated, it is not police
10 impersonation. Whatever language we could work out.

11 THE COURT: You are getting a head shake from the back
12 table.

13 MR. STECKLOW: Okay.

14 THE COURT: I think the fair answer here is that it's
15 not the case that they're refraining from arguing
16 impersonation. You quoted me, and I don't remember this
17 specifically, but it sounds like the defendant is telling the
18 truth and the defendants are lying, or the plaintiff is lying
19 and the defendants are telling the truth, or the plaintiff is
20 telling the truth but it was somebody who looked like police
21 officers who weren't police officers. And the argument to the
22 jury that Mr. Hurt may be lying or he may be telling the truth
23 but if he is telling the truth, *it wasn't our employees*, that
24 implicitly, if he is telling the truth then it is somebody with
25 a badge around his neck identifying himself as a police officer

Jl85hurC

conference

1 who is not, that is an impersonator.

2 I think upon further probing, quite candidly, counsel
3 for the defendants has indicated that that's what they're going
4 to urge to the jury or one of the things they're going to urge
5 to the jury. So, that's why, offhand, it doesn't sound
6 irrelevant but that doesn't make any old document walk into
7 evidence on its own two feet.

8 MR. STECKLOW: I can pass up to Court the document.

9 THE COURT: No. I would like to get some further
10 briefing on it and I will get a copy of the document. The
11 defendants should attach it to their letter, the documents
12 they're referring to, and if you want to get a response in I
13 would ask you do it in three business days after you get the
14 defendant's letter.

15 MR. STECKLOW: Is there a time for the defendant's
16 letter?

17 THE COURT: Yes.

18 Can you get it in in three business days?

19 MS. WILSON: From today, your Honor?

20 THE COURT: Yes. Look. I'm within my rights to say
21 skip the letter, just argue it. I am being nice here and
22 giving you more time.

23 MS. WILSON: Yes, we will be able to get it in within
24 three days.

25 THE COURT: I will tell you, when it comes to trial,

Jl85hurC

conference

1 things happen a little bit faster. This is a three-day trial
2 or so.

3 MR. STECKLOW: Yes, your Honor.

4 THE COURT: Okay.

5 MS. WILSON: And I would also point out to the Court
6 that I believe that the Court has not made any rulings on point
7 3 and point 4 of defendant's request.

8 THE COURT: What are you asking me to do?

9 MS. WILSON: Point 3, defendant's request.

10 THE COURT: Oh. Okay. I'm sorry. Yes, I see it now.

11 As I understand it the plaintiff's position a beating
12 from the police is intentional, only intentional, and nothing
13 but intentional. However, being struck by a vehicle, police
14 vehicle, could be intentional or it could be negligent.

15 Have I correctly stated the plaintiff's position?

16 MR. STECKLOW: Yes, your Honor.

17 THE COURT: So, I do not understand the plaintiffs to
18 say that they are going to argue that the beating was either
19 intentional or negligent. They're not going to do that, but as
20 to the situation with regard to the car, again, this is not an
21 *in limine* issue. This is maybe you will be knocked out at the
22 end of the case or maybe you'll tender a jury instruction or
23 maybe there will be a stipulation with the plaintiffs on it but
24 it is conceivable that the evidence could be consistent with
25 the other.

J185hurC

conference

1 MS. WILSON: Thank you, your Honor.

2 In part, I would just note that in plaintiff's
3 proposed jury instructions they do include the fact that the
4 defendant Connizzo acted negligently by using physical force.

5 THE COURT: You just heard this: That was a
6 withdrawal of it. This is not the charging conference here.

7 MS. WILSON: I understand, your Honor.

8 THE COURT: So, they argued that and then, when
9 pressed by the Court, they acknowledged that in fact I think it
10 comes out of their papers, that they're only arguing it with
11 regard to the car. All right.

12 Now, with regard to evidence of other unidentified
13 officers, I don't really understand the basis for the City's
14 argument. You can't have 1983 liability against unidentified
15 officers. I got that. But, there are -- supplemental
16 jurisdiction of this Court is invoked and the argument is that
17 if I am wrong that it was not Connizzo but it was another NYPD
18 officer, then the City should be liable on the theory of
19 respondeat superior.

20 Is that the plaintiff's argument?

21 MR. STECKLOW: Yes, your Honor.

22 MS. WILSON: Well, it is the City's argument that that
23 is not what was pled in plaintiff's amended complaint or that
24 plaintiff testified to at his deposition and at his deposition
25 plaintiff consistently identified the involved officers as

Jl85hurC

conference

1 Officer Connizzo and an unidentified John Doe officer. So, we
2 would argue that then them saying that in the alternative that
3 these other unidentified officers that have, that are somewhere
4 out there, were actually the ones who were involved, should be
5 precluded because plaintiff consistently identified Connizzo as
6 having been the officer who was involved and plaintiff's
7 amended complaint only identifies Officer Connizzo and John Doe
8 no. 1.

9 THE COURT: Well, certainly I think you may have a
10 fair point about there only being two officers involved and if
11 at trial the plaintiff tried to shift the theory to this being
12 seven people or at a different time or place, then you are not
13 on fair notice and I wouldn't allow that. But, your position
14 is that, as I understand it, that plaintiff's counsel provided
15 a photograph of one or more officers to Mr. Hurt and Mr. Hurt
16 identified Mr. Connizzo from the photograph and you maintain
17 that he is wrong. Right?

18 MS. WILSON: Yes. That's correct, your Honor.

19 THE COURT: Well, if he is wrong then it's
20 Mr. Connizzo but the jury believes it is some other member of
21 the NYPD. That has consequences in this case. It's very
22 relevant to how this case shakes out. It means the plaintiff
23 loses on the Section 1983 claim but it may mean that the
24 plaintiff prevails on the state law claims. In fact, I had one
25 such case against the City and that's exactly what happened and

Jl85hurC

conference

1 I am going to tell you, you can call up the City's attorney,
2 you can call up the plaintiff's counsel and I think they'll
3 both say that they didn't think that's what the verdict was
4 going to be but it was. And, I am going to see whether I can
5 find it.

6 Yeah, I'm pretty sure this is it, Johnson v. City of
7 New York. I didn't think there would be so many Johnsons that
8 I possibly couldn't get it but it's -- let's see if I can find
9 the trial. That will tell me -- yes, I think it's 05 civil
10 7519. Yes, 05 civil 7519 and, lo and behold, that's what the
11 verdict sheet represented and that was the outcome of the case.

12 What else?

13 MR. LONDON: Nothing from plaintiff, your Honor.

14 MS. WILSON: Nothing further from defendants, your
15 Honor.

16 THE COURT: All right.

17 MR. STECKLOW: I'm sorry. One thing, your Honor.
18 Thank you.

19 THE COURT: Yes. One thing?

20 MR. STECKLOW: Yes, one thing, a scheduling issue.

21 I am starting to teach at Fordham Law Wednesday
22 mornings 9:00 to 12:00 once a week and, if possible, I would
23 ask the Court to allow me to do that and allow the trial to
24 start at 1:00 on Wednesday the 6th if we go forward that week.

25 THE COURT: I want to be able to accommodate you but

Jl85hurC

conference

1 Fridays are my conference day so you are not going to be
2 sitting on Friday. But, this is such a short trial, I am going
3 to accommodate you.

4 MR. STECKLOW: So, thank you so much, your Honor.

5 THE COURT: Friday the 6th?

6 MR. STECKLOW: Wednesday the 6th.

7 THE COURT: Wednesday the 6th, rather. You got it.

8 MR. STECKLOW: Thank you, your Honor.

9 THE COURT: And you start at 1:00?

10 MR. STECKLOW: I finish by 12:00 at Fordham so I can
11 be here by 1:00.

12 THE COURT: Good. Excellent.

13 MR. STECKLOW: Thank you so much, your Honor.

14 THE COURT: What are you teaching?

15 MR. STECKLOW: Fundamentals of Lawyering. It is a new
16 bar requirement for New York State bar.

17 THE COURT: Good. Very good. Thank you all very
18 much. See you January 30th, maybe. That's where we are at the
19 moment.

20 MR. STECKLOW: Thank you, your Honor.

21 MS. WILSON: Thank you, your Honor.

22 THE COURT: Thank you, Pam. Happy New year.

23 o0o
24
25